UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

TOUCHTUNES MUSIC CORP., Plaintiff, v. ROWE INTERNATIONAL CORP., ARACHNID, INC., AMI ENTERTAINMENT, INC. and MERIT INDUSTRIES, INC. d/b/a/ MERIT ENTERTAINMENT, Defendants. AND RELATED COUNTERCLAIMS	Civil Action No. 07-cv-11450-RWS Oral Argument: January 9, 2013

LOCAL RULE 56.1 STATEMENT OF MATERIAL FACTS IN SUPPORT OF TOUCHTUNES'S MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT REGARDING THE '398 AND '834 PATENTS

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Pursuant to the Court's Local Civil Rule 56.1, TouchTunes Music Corp. ("TouchTunes") submits this Statement of Material Facts in support of its Motion for Summary Judgment of Noninfringement Regarding the '398 and '834 Patents.

Material Facts as to Which There is No Genuine Issue to be Tried

A.   No TouchTunes Jukebox Has Ever Included a "Data Storage Unit Having a Song Storage Location Storing Song Data and an Advertisement Storage Location Receiving Advertisement Data"

1.   No TouchTunes jukebox has ever had separate structural advertisement and song locations within a data storage unit.

> [Declaration of Francois Guy ("Guy") at ¶¶ 6, 24, 29, 34; Declaration of Dan Schonfeld, Ph.D. in Support of Non-Infringement of the '398 and '834 Patents ("Schonfeld") at ¶¶ 5, 7, 14].

2.   TouchTunes jukeboxes have always stored advertisements in the same directory folder or subfolder as songs.

> [Guy at ¶¶ 6, 24, 29, 34; Schonfeld at ¶¶ 5, 7, 14].

3.   Each TouchTunes Gen2 jukebox stores advertisements together with songs in the subfolder called "music" on its hard disk at the directory path: "/usr/local/touchtunes/music/".

> [Guy at ¶¶ 6, 24; Schonfeld at ¶ 7].

4.   Each TouchTunes Gen3 jukebox stores advertisements together with the songs in the subfolder called "music" on its hard disk at the directory path: "/usr/local/touchtunes/storage/music/".

> [Guy at ¶¶ 6, 24; Schonfeld at ¶ 7].

5.   Arachnid's technical expert, Dr. Storer, admits that TouchTunes jukeboxes store advertisements and songs in the same subfolder called "music" on its Gen2 and Gen3 Jukeboxes.

> [Schonfeld Ex. 7 (Storer Opening Infringement Report) at 86, 88, 99].

6.   Arachnid has no good faith basis to assert that any TouchTunes jukebox has ever had separate structural advertisement and song locations within a data storage unit.

> [Guy at ¶¶ 6, 24, 29, 34; Schonfeld at ¶¶ 5, 7, 14, 15, 77; Ex. 7 (Storer Opening Infringement Report) at 86, 88, 99].

B.   TouchTunes Jukeboxes Display Advertisements Based Upon Customer Interaction – or Lack Thereof – with the Jukebox

7.   TouchTunes jukeboxes have only displayed advertisements on its jukeboxes based upon customer interaction (or lack thereof) with the jukebox.

> [Guy at ¶¶ 6, 8, 10, 12, 13, 17, 22, 28, 31;   Schonfeld at ¶¶ 17, 36-40, 42, 47, 57, Ex. 7 (Storer Opening Infringement Report) at 47-48, Ex. 15 (Storer Reply Infringement Report) at 16, 18].

8.   The display of advertisements on TouchTunes jukeboxes is dictated by the times when a customer interacts with the jukebox, the nature of the interaction and how long the interaction lasts.

> [Guy at ¶¶ 6, 8, 10, 12, 13, 17, 22;   Schonfeld at ¶¶ 17, 36-40, 42, 46, 47].

9.   TouchTunes programmed its jukeboxes so that they display advertisements only in response to a customer touching the screen of the jukebox, or after a certain amount of time passes since a customer last touched the screen (*i.e.*, during the jukebox's idle mode).

> [Guy at ¶¶ 6, 8-10, 12, 13, 17, 22;   Schonfeld at ¶¶ 17, 36-40, 42, 46, 47].

10.   Because TouchTunes jukeboxes display advertisements based upon customer interaction with the jukeboxes (or lack thereof), the display of any advertisement is unpredictable, and an advertisement may not even be displayed on the jukebox at all.

> [Guy at ¶¶ 6, 8-10, 12, 13, 17, 22;   Schonfeld at ¶¶ 17, 36-40, 42, 46, 47].

11.   There is no way to determine from any data received by the jukebox a time within which, or event in relation to which, an advertisement will be run (if at all) on any TouchTunes jukebox.

> [Guy at ¶¶ 6, 8-10, 12, 13, 17, 22, 32;   Schonfeld at ¶¶ 17, 36-40, 42, 46, 47].

2064212

12.   There is no way to determine from any data received by the jukebox the frequency an advertisement will be run (if at all) on any TouchTunes jukebox.

[Guy at ¶¶ 6, 8-10, 12-14, 17, 22, 33; Schonfeld at ¶¶ 17, 36-43, 46, 47].

13.   Arachnid has no good faith basis to assert that any TouchTunes jukebox has ever downloaded, stored or used data which permits a determination of a time within which, or event in relation to which, an advertisement will be run, or which permits a determination of the frequency an advertisement will be run.

[Guy at ¶¶ 6, 8-10, 12, 13, 17, 22, 32, 33; Schonfeld at ¶¶ 17, 36-40, 42, 47-48, 77, Ex. 7 (Storer Opening Infringement Report) at 47-48, Ex. 15 (Storer Reply Infringement Report) at 16, 18].

C.   **No TouchTunes Jukebox has Ever Included the Claimed "Processing Means for Controlling the Display of Advertisement Data on Said Visual Display and to Store Advertisement Display Data in Said Memory"**

14.   No TouchTunes jukebox has ever included a processor that displays advertisements based on data, downloaded from a central management station, that includes when and the number of times to play the advertisements.

[Guy at ¶¶ 6, 8-10, 12, 13, 22, 26, 35; Schonfeld at ¶¶ 37-40, 56, 59].

15.   No TouchTunes jukebox has ever included a processor that resolves a conflict between running an advertisement and a song by displaying an advertisement at the same time of the song if the song is just audio and the advertisement is just video or at the next available time slot if the advertisement is both audio and video.

[Guy at ¶¶ 6, 27, 28, 35; Schonfeld at ¶¶ 57-59].

3

2064212

16.   In displaying advertisements, TouchTunes jukeboxes have never taken into account whether, if a song is playing, the song is just audio and the advertisement is just video or both audio and video.

[Guy at ¶¶ 6, 28, 35; Schonfeld at ¶¶ 57, 58].

17.   No TouchTunes jukebox has ever included a processor that stores downloaded advertisements at a location that is a separate location from the location where songs are stored.

[Guy at ¶¶ 6, 24, 29, 35; Schonfeld at ¶¶ 7, 14, 59].

18.   Arachnid has no good faith basis to assert that any TouchTunes jukebox has ever included a microprocessor that:

- Displays advertisements based on data downloaded from a central management station which includes when and the number of times to play the advertisements;
- Resolves a conflict between running an advertisement and a song by displaying an advertisement at the same time of the song if the song is just audio and the advertisement is just video or at the next available time slot if the advertisement is both audio and video; and
- Stores downloaded advertisements at a location separate from the location in which songs are stored.

[Guy at ¶¶ 6, 8-10, 12, 13, 22, 26-29, 35; Schonfeld at ¶¶ 7, 14, 37-40, 56-59].

D.   No TouchTunes Jukebox Has Ever Run an
Advertisement Based Upon "Said Jukebox …
<u>Not Generating a Signal Representing a Song"</u>

19.   The display of advertisements on TouchTunes jukeboxes is independent of whether or not a song is playing on the jukebox.

[Guy at ¶¶ 6, 31, 36; Schonfeld at ¶¶ 62-66, 76, Ex. 7 (Storer Opening Infringement Report) at 79-80, 89, 98].

20.   No TouchTunes jukebox has ever included a processor or any other feature that displays an advertisement based upon the fact that a song is not playing.

[Guy at ¶¶ 6, 31, 36; Schonfeld at ¶¶ 62-66, 76, Ex. 7 (Storer Opening Infringement Report) at 79-80, 89, 98].

2064212

21.   All advertisements displayed by TouchTunes jukeboxes have been displayed based upon user interaction (or lack thereof) with the jukebox, regardless of whether or not a song was playing.

> [Guy at ¶¶ 6, 8-10, 12, 13, 17, 22, 28, 31, 35, 36; Schonfeld at ¶¶ 36-38, 62-66, 76, Ex. 7 (Storer Opening Infringement Report) at 47-48, 79-80, 89, 98, Ex. 15 (Storer Reply Infringement Report) at 16, 18].

22.   Arachnid has no good faith basis to assert that TouchTunes jukeboxes display advertisements when the jukebox is not generating a signal representing a song.

> [Guy at ¶¶ 6, 8-10, 12, 13, 17, 22, 28, 31, 36; Schonfeld at ¶¶ 36-38, 62-66, 76-77, Ex. 7 (Storer Opening Infringement Report) at 47-48, 79-80, 89, 98, Ex. 15 (Storer Reply Infringement Report) at 16, 18].

Respectfully submitted,

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By: /s/ James S. Blank

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5

2064212